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No. 84-4083

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an Individual,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
and
WELLS FARGO ARMORED SERVICE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR WELLS FARGO ARMORED SERVICE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that Section 9(b)(3) of the Labor Management Relations Act, 29 U.S.C. § 159(b)(3), privileged the Respondent, Wells Fargo Armored Service Corporation, to withdraw recognition upon the expiration of the collective bargaining agreement from the Petitioner, Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, the collective bargaining representative of Wells Fargo's guards, because Petitioner admitted non-guards to membership.

TABLE OF CONTENTS

	Page
Opinions Below.....	2
Jurisdiction.....	2
Statutory Provisions.....	2
Statement.....	3
Argument.....	13
Conclusion.....	42

TABLE OF AUTHORITIES

CASES.....	Page
Armored Motor Service Co., 106 NLRB 1139 (1953).....	26,27
Brinks, Inc., 226 NLRB 1182 (1976).....	27
City National Bank & Trust Co. of Chicago, 76 NLRB 213 (1948).....	36
Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v.NLRB, 553 F.2d 1368 (D.C. Cir. 1977).....	28

Ford Motor Co. v. NLRB, 441 U.S. 488 (1979)..... 15

International Brotherhood of Teamsters etc. v. NLRB, 568 F.2d 12 (7th Cir. 1978).... 28

International Harvester Co., 145 NLRB 1747..... 36

International Telephone and Telegraph Corp. (ITT) v. NLRB, 382 F.2d 366 (3d Cir. 1967), cert. denied, 389 U.S. 1039 (1968), enforcing in pertinent part 159 NLRB 1757 (1966).....38,39, 40

Mack Manufacturing Corp., 107 NLRB 209 (1953)..... 36

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956)..... 23

NLRB v. Bel Air-Mart, Inc., 497 F.2d 322 (4th Cir. 1974)..... 17,35

NLRB v. Cardox Division of Chemtron Corp. 669 F.2d 143 (3d Cir. 1983)..... 40,41

NLRB v. City Disposal Systems, Inc., 465 U.S. ___, 115 LRRM 3193 (1984)..... 14,15

NLRB v. E.C. Atkins & Co., 147 F.2d 730 (7th Cir. 1945), vacated and remanded, 325 U.S. 838 (1945), on remand, 155 F.2d 567 (7th Cir. 1946), rev'd, 331 U.S. 398 (1947)..... 18

NLRB v. Insurance Agents, 361 U.S. 477 (1960)..... 14

NLRB v. Iron Workers, 434 U.S. 335 (1977)..... 15

NLRB v. Jones & Laughlin Steel Corp., 154 F.2d 832 (6th Cir. 1946), rev'd, 331 U.S. 416 (1974.....18,19, 24

NLRB v. Lion Oil Company, 352 U.S. 282 (1957)..... 23

NLRB v. Truck Drivers, 353 U.S. 87 (1957)..... 14

NLRB v. White Superior Division, White Motor Corp., 404 F.2d 1100 (6th Cir. 1968).....16,17, 35

NLRB v. Yeshiva University, 444 U.S. 672 (1979)..... 24

Pattern Makers' League of North America, AFL-CIO, et al. v. NLRB, et al., ___ U.S. ___ 53 USLW 4928 (U.S., June 27 1985)..... 14

Rock-Hill-Uris, Inc. v. McLeod, 236 F. Supp. 395 (S.D.N.Y. 1964), aff'd, 344 F.2d 697 (2d Cir. 1965)..... 37,38

Supreme Sugar Co., 258 NLRB 243 (1981)..... 28

Teamsters Local No. 372 v. NLRB, 735 F.2d 969 116 LRRM 2584 (6th Cir. 1984), cert. denied, 84 L.Ed. 815 (1985)..... 34

Teamsters Local 851 v. NLRB, 732 F.2d 43 (2d Cir. 1984)..... 28

United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956)..... 30

University of Chicago, 272 NLRB 126 (1984)..... 37

Utah Power Co., 258 NLRB 1059 (1956)..... 39,40

Watt v. Alaska, 451 U.S. 259 (1981)..... 23

STATUTES:

28 U.S.C. Sec. 1254(1)..... 2

Labor Management Relations Act, as amended (29 U.S.C. Sec. 151 et seq.).....passim

Section 8(a)(1) 29 U.S.C.
158(a)(1)..... 8,41
Section 8(a)(5) 29 U.S.C.
158(a)(5).....8,29,41
Section 9(b) 29 U.S.C.
159(b)..... 41

Section 9(b)(1) 29 U.S.C.
159(b)(1)..... 39
Section 9(b)(3) 29 U.S.C.
159(b)(3).....passim
Section 9(f), 29 U.S.C.
159(f), 61 Stat. 145-46
as amended, 65 Stat. 602
(repealed)..... 30,31
Section 9(g), 29 U.S.C.
159(g), 61 Stat. 145-46,
as amended, 65 Stat. 602
(repealed)..... 30,31
Section 9(h), 29 U.S.C.
159(h), 61 Stat. 145-46,
as amended, 65 Stat. 602
(repealed)..... 30,31

LEGISLATIVE MATERIALS:

H.R. 3020, 80th Cong.,
1st Sess. 2(12)(B)
(April 18, 1947)..... 19
H.R. 3020, 80th Cong.,
1st Sess. 2(a)
(May 13, 1947)..... 19

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OPINIONS BELOW

The opinion of the court of appeals is reported at 755 F.2d 5. The decision and order of the National Labor Relations Board and the decision of the administrative law judge are reported at 270 NLRB No. 106.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 5, 1985. On March 26, 1985, the Court of Appeals entered an order denying Petitioners' petition for rehearing and its suggestion for a rehearing in banc. The petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 9(b)(3) of the Labor Management Relations Act, 1947, as amended ("Act"), 29 U.S.C. § 159(b)(3). This provision, and other relevant statutory provisions, are reprinted in Petitioners' Appendix at pp. 77a-81a.

STATEMENT OF THE CASE

A. Statement of Facts

Wells Fargo Armored Service Corporation ("Wells Fargo" or "Company") an armored car service, transports and delivers money, securities and other valuables for its customers, primarily banks and other commercial institutions. The Company operates two facilities in the New York City area and employs approximately

93 persons as guards. (Pet. A. 3a, 48a.)[1/]

For over thirty years Wells Fargo's guards in its two New York City facilities were represented by Armored Car Chauffeurs and Guards Union Local 820, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 820"). Local 820's membership and leadership consisted exclusively of guards employed in the armored car industry. The last collective bargaining agreement between Local 820 and Wells Fargo was effective through March 16, 1980. (Pet. A. 3a, 49a.)

In June, 1979, Wells Fargo received notification that the General Executive Board of the International Brotherhood of

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1/ "Pet. A." refers to the Appendices filed by the Petitioners.

Teamsters had directed that Local 820 merge with Truck Drivers Local 807, International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America ("Local 807"), a much larger local that represents non-guard employees. Wells Fargo subsequently recognized Local 807 pursuant to a successorship clause in the bargaining agreement with Local 820, and Local 807 began administering its predecessor's collective bargaining contract. (Pet. A. 3a, 49a.)

Early in 1980, Local 807 notified Wells Fargo that it desired to open negotiations for a collective bargaining agreement to replace the existing one which was due to expire in March. (Pet. A. 4a, 49a-50a). Between February and mid-April, Wells Fargo officials met with Local 807 representatives on eleven

occasions and twice agreed to extend the contract after it had expired in March. (Pet. A. 4a, 49a-50a).

During these negotiations, the Company sought economic and security-related concessions which it believed were essential. Although the parties were able to reach agreement on some matters, Local 807 rejected the proposed concessions which Wells Fargo considered critical. (Pet. A. 4a, 50a.)

While negotiations were in progress in early April, a crew of Wells Fargo guards refused to cross a Local 807 picket line at a Wells Fargo customer with a delivery worth several millions of dollars. For a period of time, the armored vehicle remained with its cargo stranded on the street. Subsequently, the valuable cargo was returned to the Wells Fargo terminal. (Pet. A. 57a-58a.)

By mid-April, Wells Fargo and Local 807 were still unable to resolve a number of substantial economic and non-economic issues. During a bargaining session on April 11, Wells Fargo submitted a "final offer" to Local 807. On April 13, the Local 807 membership rejected Wells Fargo's proposal, and the union commenced an economic strike against Wells Fargo on the following day. (Pet. A. 4a, 50a.)

During the strike, the parties met on three occasions but were unable to resolve their differences. On June 2, 1980, Wells Fargo withdrew recognition from Local 807 as the bargaining representative of the Company's guards. (Pet. A. 4a, 50a.)

B. Proceedings Below

2. Local 807 and Fred Caputo, a Wells Fargo employee, filed separate

unfair labor practice charges alleging that Wells Fargo had unlawfully withdrawn recognition from Local 807. The cases were consolidated and a complaint issued in October, 1980, alleging that Wells Fargo had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from Local 807. After an evidentiary hearing, the administrative law judge issued his decision and found that the Company was estopped from withdrawing recognition from Local 807. (A. 4a,47a.)

In a 3-1 decision, a majority of the Board (Member Zimmerman dissenting) reversed the administrative law judge and held that Wells Fargo was privileged to withdraw recognition from Local 807. Accordingly, the Board dismissed the complaint.

In finding that Wells Fargo's action was lawful, the Board noted that the purpose of Section 9(b)(3) of the Act was "to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of non-guard employees or its affiliation with other unions who represent non-guard employees." (Pet. A. 32a.)

The Board rejected Local 807's argument that Section 9(b)(3) only precludes the certification of a mixed union.[2/] The Board observed that its prior decisions have interpreted Section 9(b)(3) broadly in order to effectuate the policies of the Act. Moreover, the Board noted that a potential conflict of loyalties exists

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2/ "Mixed union" refers to a union that represents both guard and non-guard employees.

regardless of whether the bargaining relationship is initially created through certification or is compelled to continue by virtue of a bargaining order.

The Board also rejected Petitioners' additional argument that Wells Fargo should be estopped from withdrawing recognition because the Company had voluntarily recognized Local 807. The Board held that Wells Fargo was not estopped from withdrawing recognition because an estoppel theory cannot operate to preclude the intended beneficiary of a statutory provision from asserting rights under it. Here, the Board noted that the intended beneficiaries of Section 9(b)(3) were employers of guards, such as Wells Fargo. (Pet. A. 35a-36a.)

3. In a 2-1 decision, the Second Circuit (Judge Mansfield dissenting)

upheld the Board's order. The Court noted that Section 9(b)(3) was enacted to avoid potential conflicts of loyalties and has been broadly construed to give effect to that purpose. (Pet. A. 6a-8a.)

The Court further noted that the potential for divided loyalties exists both at the initial stage when an employer voluntarily recognizes a mixed union as well as at a later time. Accordingly, the Second Circuit held that "[e]mployers may choose at the outset not to rely on the strictures that Congress enacted for their benefit, but the policy concerns inherent in the statute require that employers have the right to rely on it at some later point." (Pet. A. 11a.)

The Court rejected Petitioners' contention that Section 9(b)(3) should be narrowly construed to prohibit only the

certification of mixed unions in order to avoid undermining the stability of existing bargaining relationships. The Court found that "Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential of divided loyalties." (Pet. A. 11.)

In rejecting Petitioners' estoppel argument, the Court, agreeing with the Board, held that the application of an estoppel theory in this case is inappropriate because "recogniz[ing] an estoppel would result in a situation inconsistent with the purpose of the statute." (Pet. A. 11a-12a.)

Finally, the Court rejected Petitioners' claim that the Board's interpretation of Section 9(b)(3) violates both the union's and its members' First

Amendment right to freedom of association. The Court found that the public interest served by the Board's interpretation outweighs "the minimal infringement" on First Amendment rights. Accordingly, the court held that Section 9(b)(3) as applied by the Board was constitutional. (Pet. A. 12a.)

ARGUMENT

1. This case presents a narrow question of statutory construction for review, namely whether the Board reasonably interpreted Section 9(b)(3) so as to permit an employer of guards to withdraw recognition from a "mixed" union that represents both guards and non-guards at the expiration of a contract. This is precisely the type of issue which Congress delegated to the Board. As the Supreme Court recently noted

in Pattern Makers' League of North America, AFL-CIO, et al. v. NLRB, et al., _____ U.S. ___, 53 U.S.L.W. 4928, 4933 (U.S., June 27, 1985), "[t]he Board has the primary responsibility for applying the general provisions of the Act to the complexities of industrial life." Accordingly, it is the Board, in the first instance, which must strike a balance between the competing interests of labor and management to effectuate a national labor policy. NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957); NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960). In reconciling these competing claims, the Board's interpretation of the statutory provisions of the Act is entitled to considerable deference. Pattern Makers' League of North America, AFL-CIO, et al. v. NLRB, 53 U.S.L.W. at 4929, NLRB v. City Disposal

Systems, Inc., 465 U.S. ____, 115 Labor Rel. Rep. (BNA) 3193, 3197 (1984); NLRB v. Iron Workers, 434 U.S. 335, 350 (1977). Consequently, if the Board's construction of the statute is reasonable, its decision should be affirmed even if a reviewing court might prefer a different statutory interpretation. Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

2. Contrary to Petitioners' claim (Pet. Br. 8-9), guard employees will not be deprived of union representation as a consequence of the Board and court decisions in this case. As the Second Circuit noted (Pet. A. 10a, 12a), guards may join any union they wish; however, in order to obtain the benefits that derive from representation by a certifiable union, guards must join a union that represents guards exclusively.

As discussed more fully infra pp. 14-17, in enacting Section 9(b)(3), Congress sought to strike a balance between, on the one hand, the interest of guard employees in selecting their collective bargaining representative and, on the other hand, the interest of the guards' employers in avoiding a situation in which the potential for divided loyalties would arise. Since such a situation would occur where a union represents both guards and non-guards, Congress struck a balance by precluding the Board from compelling -- directly or indirectly -- an employer to recognize a mixed union. As the Sixth Circuit noted in NLRB v. White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 (1968):

> [W]e think it is clear that § 9(b)(3) does not operate to prevent guard employees from joining a labor organization, and this principle extends

> to labor organizations which also represent non-guard employees. Indeed, the real significance of § 9(b)(3) is the restrictions which it imposes on the Board.

Accord, NLRB v. Bel Air-Mart, Inc., 497 F.2d 322, 326-327 (4th Cir. 1974).

Although, as the Second Circuit noted (Pet. A. 10a), the proscription against mixed unions "means that there is little sense in an employee remaining a member of such unions," guards nevertheless have ample opportunity for representation by unions that represent guard employees exclusively. Indeed, shortly after the court issued its decision in the instant case, two unions which represent guards began organizing campaigns at Wells Fargo's New York facilities and filed representation petitions requesting an election. It is evident from these events that guard employees not only have the

opportunity to be represented, but that guard unions are actively competing to represent guard employees.3/

3. Contrary to Petitioners' claim (Pet. Br. 10-16), the decisions below are consistent with the statutory language and legislative history of Section 9(b)(3). It is undisputed that Section 9(b)(3) was enacted in response to the Supreme Court's decisions in NLRB v Jones & Laughlin Steel Corp. 331 U.S. 416 (1947) and NLRB v E.C. Atkins & Co., 331 U.S.398 (1947), which required an employer of guards to bargain with a union that represented both guard and non-guard employees. Although the

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3/ A bill amending Section 9(b)(3) is presently before Congress. The bill would significantly limit the statutory definition of "guard," excluding, inter alia, armored car security personnel. The International Brotherhood of Teamsters is strongly supporting the passage of the proposed amendment.

House-Senate Conference Committee agreed that guards would retain their status as "employees" under the Act,[4/] the Committee was impressed with the Sixth Circuit's position in Jones & Laughlin (154 F.2d 932 (1948)). The Sixth Circuit had denied enforcement of the Board's order which had required the employer to bargain with a mixed union that represented both the employer's guard and production employees. 53 NLRB 1046 (1947). In holding that it was inappropriate for the Board to certify

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4/ The House of Representatives initially passed a bill that would have effectively classified guards as "supervisors" and thereby denied guards the protection and rights afforded "employees" under the Act. H.R. 3020, 80th Cong., 1st Sess. 2(12)(B) (April 18, 1947). The Senate, however, defeated the House proposal to categorize guards as supervisors, and thereby preserved the "employee" status of guards. H.R. 3020, as amended, 80th Cong., 1st Sess. 2(a) (May 13, 1947).

such a mixed union, the Sixth Circuit reasoned that the guards

> have a private obligation to their employer . . . . In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards . . . would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

154 F.2d at 935.

In the instant case, both the Board and Second Circuit properly concluded that in order to effectuate the statutory purpose for which Section 9(b)(3) was enacted, the Board cannot compel an employer to bargain with a mixed union that represents a unit of guards, regardless of the parties' prior bargaining history. As the Board observed (Pet. App. 32a):

> "Congress' purpose in enacting Section 9(b)(3) was to shield employers from the potential conflict of loyalties arising from the guard union's representation of non-guard employees or its affiliation with other unions

> who represent non-guard employees. However, this potential conflict of loyalties exists whether a mixed guard union is certified or not. Viewed in this light, there is no basis for the Board's drawing a distinction between initial certification and, as here, the compulsory maintenance of a bargaining relationship through the use of a bargaining order."

Thus, both the Board and court recognized the Congressional mandate that no employer of guards shall be forced to recognize and bargain with a mixed union, for to do so places the employer in the very situation from which Congress intended to insulate it.

Indeed, as the Second Circuit noted (Pet. A. 11a), the potential for a conflict of loyalties was clearly present in this case. Here, the merger of Local 820 into Local 807 resulted in Wells Fargo's guards becoming members of a large general trucking local that represented predomi-

nantly non-guard employees. Since Local 807 represented employees of one of Wells Fargo's customers and other potential customers, there was the potential that Wells Fargo guards would confront a Local 807 picket line in the course of their work. As described supra p. 5, this potential materialized and Wells Fargo guards were faced with a conflict between their loyalty to Local 807 and their loyalty to their employer. The guards resolved this conflict in favor of their union and refused to cross the picket line while their cargo, worth millions of dollars, was left stranded on the street.

Contrary to Petitioners' claim (Pet. Br. 12), the fact that the language of Section 9(b)(3) only expressly mentions certification does not undermine the Board's analysis that it is precluded from

compelling an employer to bargain with a mixed union after the expiration of a collective bargaining agreement. Thus, it is well settled that a statute must be analyzed and applied in light of that provision's legislative history. As the Supreme Court has stated, "circumstances of the enactment [of a statute] may persuade a court that Congress did not intend words of common meaning to have their literal effect." Watt v. Alaska, 451 U.S. 259, 266 (1981). Accord: NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). Moreover, where it is evident that Congress failed to consider the application of a statutory provision to a particular set of circumstances, the Board has the responsibility to apply the statute to those circumstances in a manner

consistent with the provision's purpose. NLRB v. Yeshiva University, 444 U.S. 672, 679-681 (1979).

Here, Congress passed Section 9(b)(3) in order to eliminate situations in which employers would be compelled to bargain where the potential for divided loyalties exists. However, as both the court and Board noted, the case that presented the issue at the time Section 9(b)(3) was drafted was Jones and Laughlin, a case in which the Board had issued its bargaining order pursuant to Board certification of the mixed guard/non-guard union. As the House-Senate conferees were primarily concerned with precluding a repetition of that situation, they adopted language that accomplished this result -- they prohibited the Board from certifying a mixed union as the representative of guard

employees. Congress did not consider the situation where an employer voluntarily recognized an uncertified mixed union.

Moreover, there is absolutely no indication in the legislative history of this provision that Congress intended to distinguish between bargaining orders issued as a result of initial certification and bargaining orders issued in other contexts. As the Board and court explained in the instant case (Pet. A. 11a, 32a), the conflict of loyalties identified in Jones & Laughlin and considered so significant by Congress exists irrespective of whether the mixed guard/nonguard union is certified. Based on the legislative purpose underlying Section 9(b)(3), the Board was clearly warranted in interpreting the statutory provision as proscribing the Board from compelling an

employer to bargain with a voluntarily recognized mixed union where the employer seeks to terminate the bargaining relationship at the expiration of a collective bargaining agreement.

Indeed, the Board, with court approval, has not confined itself to the literal wording of Section 9(b)(3) in applying that provision to other situations. Thus, for example, in Armored Motor Service Co., 106 NLRB 1139 (1953), the Board held for the first time that armored car guards were "guards" within the meaning of Section 9(b)(3). Although this conclusion is not required by the plain language of Section 9(b)(3),[5/] it is compelled by the

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5/ Section 9(b)(3) defines "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the

FOOTNOTE CONTINUED

policy underlying the section. As the Board stated in that case:

> The danger of divided loyalty which Congress sought to eliminate may not be quite so far-reaching in the case of armored-car guards [as opposed to plant guards], but it is, nevertheless, present. A conflict of loyalty could arise, for example, if the guards should be called upon to deliver money or valuables to one of their customers whose employees were represented by the same union as represented the armored-car guards and the employees of the customer were on strike and picketing the premises of the customer.

106 NLRB at 1140.

The Board also relied on the congressional intent underlying Section 9(b)(3) in Brink's, Inc., 226 NLRB 1182 (1976). There, the Board held that "couriers" were "guards," because they were subject to the

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5/ FOOTNOTE CONTINUED

employer's premises." (emphasis added). Armored car guards protect primarily property belonging to their employer's customers, not to their employer.

potential conflict of loyalties Congress addressed in Section 9(b)(3). See also, Supreme Sugar Co., 258 NLRB 243 (1981). (Board finds watchmen are guards where these individuals are "the employer's sole guardians against loss or damage to property.")6/

In sum, the Board and the courts have not been constrained by the language of Section 9(b)(3) in fashioning "guard law"

6/ Courts have recognized the propriety of the Board's expanded coverage of Section 9(b)(3) in order to effectuate the purposes of the Act. For example, the Second Circuit recently approved the Board's policy of considering couriers as "guards." See Teamsters' Local 851 v. NLRB, 732 F.2d 43, 44 (2d Cir. 1984). And other courts have found the Board's inclusion of armored car security personnel as guards within the meaning of Section 9(b)(3) to be appropriate. See International Brotherhood of Teamsters, etc. v. NLRB, 568 F.2d 12, 15-16 (7th Cir. 1978); Drivers, Chauffeurs, Warehousemen and Helpers, Local 71 v. NLRB, 553 F.2d 1368, 1372, 1378 (D.C. Cir. 1977).

over the last 30 years. To the contrary, their primary purpose has been to effectuate the intent of Congress. They have recognized that there are situations in which the potential conflict of loyalties might arise, not all of which could have been anticipated by Congress, and their decisions have construed Section 9(b)(3) accordingly.7/

7/ Petitioners argue (Pet. Br. 13-16) that the legislative history of Section 8(a)(5) demonstrates that the Board "attributed far too much to certification" in the context of Section 9(b) (3). Petitioner relies on the fact that Congress expressly rejected a proposed amendment to Section 8(a)(5) which would, in effect, have made an employer's obligation to bargain contingent on a union's certification. However, the legislative history of Section 8(a)(5) demonstrates that Congress expressly considered employers' bargaining obligations arising from voluntary recognition and Board certification respectively. By contrast, as noted above, Congress did not consider the implications of voluntary recognition in the context of Section 9(b)(3). More importantly,

FOOTNOTE CONTINUED

7/ FOOTNOTE CONTINUED

however, the interests protected by Sections 9(b)(3) and 8(a)(5) are different. While Congress' refusal to amend Section 8(a)(5) had the effect of maintaining the stability of bargaining relationships and protecting employees' rights, the inclusion of Section 9(b)(3) was intended to limit the rights of guard employees as a means of protecting the interest of guard employers. See discussion supra at pp. 14-17.

Petitioners rely (Pet.Br.14-15) on United Mine Workers v. Arkansas Oak Flooring Company, 351 U.S. 62 (1956), to support their contention that the Board and Second Circuit have erroneously made a union's status as collective bargaining representative contingent on Board certification. Petitioners' reliance on this case is misplaced. Arkansas Oak dealt with the ramifications of a union's failure to comply with Sections 9(f), (g) and (h) of the Act, subsequently repealed, which denied unions access to the Board's processes if they failed to comply with certain filing requirements. In that case the Supreme Court held that a state court could not enjoin a union from engaging in recognitional picketing despite the fact that the union could not be certified because it had not complied with Sections 9(f), (g) and (h). The Court notes that

FOOTNOTE CONTINUED

4. Petitioners argue (Pet. Br. 17-18) that the Board's and Court's interpretation of Section 9(b)(3) is erroneous because it undermines the stability of existing bargaining relationships. While it may be true that Section 9(b)(3) does not foster stability in bargaining

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7/ FOOTNOTE CONTINUED

although the union was not certifiable and could not resort to the Board for a bargaining order, employees were free to select the union as their representative and use self-help -- strikes and picketing -- to induce the employer to voluntarily recognize the union. Id. at 74-75. Arkansas Oak does not hold that the Board is compelled to issue a bargaining order where it cannot certify a union or where recognition was intended to be entirely voluntary. Moreover, Section 9(b)(3) serves an entirely different purpose than Sections 9(f), (g) and (h) did. Section 9(b)(3) was intended to limit the guards' right to representation by any union of their choice as a means of insulating guards' employers from Board compulsion to recognize a mixed union. Sections 9(f), (g) and (h), on the other hand, were intended merely to encourage unions to comply with filing requirements.

relationships between mixed unions and employers, this factor does not demonstrate that the construction of Section 9(b)(3) by the Board and Second Circuit is erroneous. It is undisputed that Congress amended the Act in order to shield employers of guards from the potential of divided loyalties in the event of labor strife. Although employers were permitted to recognize such unions voluntarily, there is no evidence that Congress was concerned with protecting the stability of these bargaining relationships between mixed unions and employers. Indeed, as the Second Court noted (Pet. A. 9a-10a), Congress' express preclusion of the Board from giving its imprimatur to these relationships is evidence that these relationships were disfavored.

Moreover, compelling employers to maintain bargaining relationships with mixed unions would clearly jeopardize the employers' interest that Congress sought to protect. Thus, for example, in a situation where an employer of guards voluntarily recognizes a non-certifiable mixed union, the nature of the bargaining relationship will likely change over time -- new union leadership unsympathetic with the security concerns of a guard employer may be elected or there may be a merger with a "stranger" union -- and as a consequence the risk of a conflict of loyalties may surface or increase. It would certainly not effectuate the underlying purpose of Section 9(b)(3) to prohibit an

employer from extricating himself from such a relationship.8/

5. Contrary to the Petitioners' contention (Pet. Br. 12), the Board's decision in this case does not represent a departure from prior case law in which the Board has protected the statutory rights of guard employees. The Board and courts have consistently held -- and will no doubt continue to do so -- that guards' participation in union activities is protected conduct. Accordingly, an employer violates the Act by acting in a discriminatory or retaliatory manner against guard

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8/ In other contexts the stability of bargaining relationships has been sacrificed to further the Act's objectives. Thus, for example, an employer who recognizes a supervisors' union may withdraw recognition from the union because Congress intended such recognition to be entirely voluntary. Teamsters Local No. 372 v. NLRB, 735 F.2d 969 (6th Cir. 1984), cert. denied, 84 L. Ed. 815 (1985).

employees because they engage in protected activities. See e.g. NLRB v. Bel-Air Mart, Inc., supra (employer violated the Act by discharging a guard for attending a meeting of a mixed union); NLRB v. White-Superior Div., White Motor Corp., supra (employer violated the Act by announcing that it was contracting out guard work and would transfer guards to production and maintenance units in response to a mixed union's request to bargain.) Thus, the decision in the instant case does not diminish the statutory rights of guard employees that the Board has previously protected.

However, the Board has also consistently held that it is prohibited from issuing a bargaining order in favor of a mixed union that is ineligible for certification as the bargaining representative

of a unit of guards. Thus, in City National Bank & Trust Co. of Chicago, 76 NLRB 213, 214 (1948), the Board applied this principle for the first time, observing

> [t]he unit which the Union seeks to represent comprises guards. The union is an affiliate of an organization which admits employees other than guards into membership. Accordingly, in view of the [1947] amendments to the Act and the Union's affiliation, we do not believe that an order should be made in this case requiring the respondents to bargain . . .

Accord, Mack Manufacturing Corp., 107 NLRB 209 (1953) (Board held that employer lawfully refused to bargain with mixed guard/non-guard union that was improperly certified); see also International Harvester Co., 145 NLRB 1747 (1964) (Board permitted employer's petition to decertify union that had been certified as bargaining representative of guard unit because union

subsequently became affiliated with a non-guard union).

Moreover, the Board has represented to federal courts, and courts have found, that the Board cannot issue a bargaining order in favor of a union ineligible for certification under Section 9(b)(3) of the Act. Thus, in Rock-Hill-Uris, Inc. v. McLeod, 236 F. Supp. 395 (S.D.N.Y. 1964), affd, 344 F.2d 697 (2d Cir. 1965), the court approved the Board's former discretionary policy of placing non-certifiable unions on election ballots and certifying only arithmetic results if the ineligible union won the election.9/ In approving this practice, however, the court relied

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9/ In The University of Chicago, 272 NLRB No. 126 (1984), the Board reversed its policy of allowing non-certifiable unions to be included on the ballot in a representation election.

on the Board's representation that it did not and would not "[process] representation petitions or refusal-to-bargain complaints from labor organizations disqualified from certification." 236 F. Supp. at 397 (footnote omitted) (emphasis added).

6. Relying on the Third Circuit decision in International Telegraph and Telephone Corp. (ITT) v. NLRB, 382 F.2d 366 (1967), cert. denied, 389 U.S. 1039 (1968), Petitioners argue (Pet. Br. 19-20) that Wells Fargo should be estopped from terminating its relationship with Local 807 because the company had voluntarily recognized the union. Petitioners' reliance on this case is misplaced. In ITT the employer was estopped from withdrawing recognition from a union despite the fact that the bargaining unit was a non-certifiable mixed unit of professional and non-professional

employees. However, ITT is easily distinguishable from the instant case. As the Board explained in its decision below (Pet. A. 34a-35a), the employer in ITT could not justify withdrawing recognition by relying on a statutory provision -- in that case Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1)[10/] -- for which it was not the intended beneficiary. The Board contrasted ITT with Utah Power Co., 258 NLRB 1059 (1981), a case in which the Board held that professional employees, as intended beneficiaries of Section 9(b)(1), were not precluded from asserting their statutory right under Section 9(b)(1) to

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10/ Section 9(b)(1), 29 U.S.C. 159(b)(1), provides that the Board is prohibited from certifying a union composed of professional and non-professional employees unless the professional employees have voted to be included in a "mixed" unit.

have a self-determination election even though they had not objected to their inclusion in a mixed professional/non-professional unit for 43 years.[11] Relying on Utah Power, the Board in this case properly determined that "[Wells Fargo] was not estopped from withdrawing recognition because the estoppel theory . . . does not operate to preclude the intended beneficiary of the statute from asserting rights thereunder" (Pet. A. 35a - 36a).[12]

11/ Two members of the Board also distinguished the instant case from ITT on the additional grounds that, unlike the situation in ITT , Wells Fargo's relationship with Local 807 was short-lived and its withdrawal of recognition occurred in a context free of unfair labor practices. (Pet. A. 35a).

12/ Petitioners also rely (Pet. Br. 19-20) on NLRB v. Cardox Div. of Chemtron Corp., 699 F.2d 148 (3d Cir. 1983) to support their estoppel argument. In

FOOTNOTE CONTINUED

12/ FOOTNOTE CONTINUED

Cardox the employer withdrew recognition from a union that it had voluntarily recognized on the ground, inter alia, that the unit was inappropriate. The Board found that the employer was estopped from withdrawing recognition and, consequently, that its conduct was violative of Section 8(a)(5) and (1) of the Act. The Court remanded the case to the Board on unrelated grounds, noting that "in a voluntary recognition case, Section 9(b) requires only that the Board make a determination that the unit agreed upon by the parties is not inconsistent with the National Labor Relations Act and past Board policy." 699 F.2d at 156.

Petitioners' reliance on the dicta in Cardox quoted above is misplaced. As the quoted portion of the Third Circuit's decision makes clear, the court was not discussing Section 9(b)(3). That provision of the Act represents a limitation on Section 9(b). Moreover, the two provisions, Sections 9(b) and 9(b)(3), serve entirely different purposes. While Section 9(b) requires that the Board determine that a proposed bargaining unit is appropriate in order to protect employees (see 699 F.2d at 166), Section 9(b)(3) was intended to insulate employers from the possibility of divided loyalties. In sum, Cardox is inapposite.

CONCLUSION

For the foregoing reasons, we respectfully submit that Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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